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## Proposal for an AI Civil Liability Directive

### 1. Directive on AI Liability

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The European Commission has published its [proposal for a Directive](#) on the adaptation of non-contractual liability rules for Artificial Intelligence (the "**Directive**"). It is intended to address the current legislative difficulties regarding liability claims for damage arising from products and services based on Artificial Intelligence ("**AI**") due to the so-called *black box effect*, and completes the regulation that the European Commission is preparing for the new challenges posed by the spread of AI.

The *black box effect* refers to the specific characteristics of AI - such as, for example, its complexity and opacity - which make it difficult to prove the elements necessary for the establishment of fault and causation under the current legal framework, potentially rendering the injured parties defenceless. It also affects the legal certainty of companies that experience difficulties in assessing and predicting their risk exposure, particularly for companies with an international component.

The proposal for a Directive also follows the [Report on the safety and liability implications of artificial intelligence, the internet of things and robotics](#) presented on 19 February 2020, according to which "these liability challenges must be addressed to ensure the same level of protection as for victims of traditional technologies, while maintaining a balance with the needs of technological innovation. This will help to build confidence in these new emerging digital technologies and create investment stability".

In short, following [Recommendation 2020/2014\(INL\)](#) of the European Parliament, the Directive aims to harmonise the rules on non-contractual liability in AI in the internal market in order to avoid regulatory fragmentation of civil liability, guaranteeing the legitimate compensation of injured parties, reducing legal uncertainty for companies and preventing Member States from adopting different standards.

Concerning the scope of application of the Directive, the Proposal states that it will apply to non-contractual civil claims for damage caused by AI systems, provided that liability arises from negligent or wilful acts or omissions. Consequently, consistency is sought between

the provisions of the Directive and other Community or domestic legislation on the civil liability of other agents such as intermediary service providers, as well as with the provisions of the Digital Services Regulations (*Digital Services Act*). The Directive also distinguishes between claims brought against (i) providers of high-risk AI, and (ii) natural or legal persons using such systems.

Thus, firstly, a system of proof for high-risk AI (i.e. AI in robot-assisted surgeries) will be created to allow the substantiation of civil claims for damages, consistent with the risk system provided for in the [Regulation establishing harmonised rules on Artificial Intelligence \("Artificial Intelligence Regulation"\)](#). Secondly, the rules on the burden of proof in civil non-contractual claims for damage caused by AI will be relaxed.

Regarding the provision of evidence, the Proposal provides that courts may order high-risk AI providers to hand over relevant and proportionate evidence about the system suspected of causing harm, as well as requiring the preservation of such evidence. It also provides that claimants may request the production of evidence from suppliers that have not been sued as long as a proportionate effort is shown in trying to obtain it from the defendant supplier.

In order to address the *black box effect*, Article 4 provides for the creation of a rebuttable presumption of causality between the breach and the result produced by the AI in those cases in which the defendant's fault can be proven on the basis of other rules, either EU or national (e.g. the rules governing the operation of unmanned aircraft). This presumption shall apply in three cases: (i) high-risk AI where the court considers it disproportionately difficult to prove causation; (ii) limited or minimal-risk AI where the court considers it unduly burdensome for the claimant to prove causation; and (iii) where the defendant used AI for non-professional activities, provided that the defendant materially interfered with its operation or refused to provide details of the conditions of the AI's operation.

A presumption of causation is also provided for in cases where the defendant provider fails to comply with a court order to disclose or preserve evidence, although it will still be necessary to establish that the actions or omissions of the AI in question resulted in specific harm. However,

in order to promote compliance with the disclosure obligation, an exception to the presumption of causation is provided for high-risk AI providers or users in cases where they demonstrate that the claimant had access to sufficient evidence and knowledge to prove the causal link.

Ultimately, the Directive will establish for the first time subjective liability rules in matters of AI damage, taking into account the risk system of the AI Regulation, and ensuring a simplification of the burden of proof in matters of non-contractual AI damage.

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